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Dear Subscriber,

FSK Publishing Honors:

From time to time, an accomplishment of an FS&K attorney is deserving of special mention and recognition. This past month, Amanda Manukian, Managing Attorney of Floyd, Skeren & Kelly's Santa Monica office, earned such recognition after working closely with the Los Angeles District Attorney's Office who arrested the applicant in a claim being defended by Ms. Manukian on four counts of attempted perjury.

Applicant was being held on \$60,000 bail. On the day trial was to begin in the case, The Los Angeles District Attorney's Office Investigators decided to arrest the applicant at the Santa Monica Appeals Board.

This arrest was made possible for the Los Angeles District Attorney's Office in no small part due to the hard work, tireless dedication and skilled litigation strategy that Ms. Manukian brings to all of her work with Floyd, Skeren & Kelly.

Congratulations on a job well done from all of us at FS&K Publishing.

CASE LAW UPDATES:

The WCAB Reverses Two Prior En Banc Opinions Addressing Appropriate Rating Schedule

Baglione v. Hertz Car Sales (2007) (en banc)
[cite pending]

The WCAB reversed a prior WCAB en banc opinion in this matter. In the new opinion (*Baglione II*) the WCAB held that in order to preserve the application of the 1997 Rating

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schedule in a claim arising before January 1, 2005, there must either be any comprehensive medical-legal report evidencing permanent disability or a treating physician's report evidencing permanent disability.

[Editor's Note: The holding in Baglione II is a reversal of the WCAB's prior decision in this case wherein it was held that a comprehensive medical legal report, even without evidence of permanent disability, issuing before January 1, 2005 was sufficient to preserve the 1997 rating schedule.]

Pendergrass v. Duggan Plumbing (2007) (en banc)
[cite pending]

The WCAB reversed a second prior WCAB en banc opinion in the matter of *Pendergrass v. Duggan Plumbing (Pendergrass II)*. In the new opinion, the WCAB held en banc that in order to preserve the 1997 rating schedule under the 'notice' exception set forth in Labor Code §4660(d), the last payment of temporary disability defines the point at which notice is required to be provided to the applicant under Labor Code §4061. Thus, in cases where the last payment of temporary disability was due prior to January 1, 2005, the notice exception to utilizing the new rating schedule is met.

[Editor's Note: The above is a reversal of the prior en banc opinion in this case wherein it was held that if the first payment of temporary disability was due prior to January 1, 2005, the 1997 rating schedule was preserved and the exception met.]

Costco Wholesale Group and Sedgwick Claims Management v. WCAB (2007)
[cite pending]

Costco Wholesale Group and Sedgwick Claims Management Services v. WCAB is set for oral argument before the First District Court of Appeal on May 5, 2007. In this case, the issue before the District Court of Appeal is whether the existence of permanent disability must be indicated in either a comprehensive medical-legal report or a treating physician's report prior to January 1, 2005 in order to apply the 1997 rating schedule. The central issue in this case was decided in *Baglione II*, above, at the WCAB level. However, the Appellate Court is not bound by the WCAB decision and could enter an opinion in contrast to the most recent decision in *Baglione II*.

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Trial Decisions Issue on the Definition of an 'Amputation' under Labor Code §4656(c)(2)(C).

Conflicting opinions have issued from the trial level addressing the definition of 'amputation' under labor Code §4656(c)(2)(C). Labor Code §4656(c)(2)(C) sets forth exceptions to the 104 week limit on temporary disability, one of which is for amputations. As can be seen below, this is anticipated to be a heavily litigated issue for at least the near future. Currently, there are no known WCAB or Appellate opinions on this issue.

In *Kirkpatrick v. Dominican Santa Cruz Hospital*, (Salinas), the WCJ found that the removal of disk material from the cervical spine and bone material from the hip were 'amputations' under the meaning of the Labor Code and awarded temporary disability beyond 104 weeks.

In *Cruz v. Mercedes Benz of San Francisco, et al.*, (San Francisco), the WCJ held that the removal of portions of a posterior vertebral body and bone from the left iliac crest during a lumbar fusion procedure followed by a laminotomy procedure constituted amputations under the Labor Code thus entitling the applicant to receive more than 104 weeks of temporary disability indemnity.

In contrast to the above cases, in *Murrillo v. Hi Point/Norco Ranch*, (Los Angeles), the WCJ held that removal of disk material did not constitute an amputation under the Labor Code and declined to apply the exception allowing for more than 104 weeks of temporary disability.

Issue of Applicant Attorney Fees for Post Award Litigation of Medical Treatment Requests Before the California Supreme Court

Smith v. WCAB and California Youth Authority, and Amar v. WCAB and Mel Clayton Ford accepted for Review by the California State Supreme Court.

The California State Supreme Court recently accepted review of the Smith and Amar cases wherein the Second District Court of Appeal held that applicant attorneys were entitled to fees for resisting efforts of the insurance carrier to deny requested medical treatment to their clients.

For a more detailed discussion of the Second District Court of Appeal holdings in Smith and Amar, the reader is referred to www.workcomptimes.com, Past Articles, Vol. VI.

As a result of the Supreme Court accepting review of these matters, the Smith and Amar cases may not currently be cited as binding authority.

Again, we thank you for your interest in FS&K Work Comp News and look forward to keeping you informed on the Workers' Compensation issues that most affect you.

Sincerely,
The FSK Newsletter Team
Jason C. Hilfrink
(Chief Legal Editor)

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